

EXHIBIT 2

FILED UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SONOS, INC.,
Plaintiff,
vs. Case No. 3:21-CV-07559-WHA
GOOGLE LLC
Defendant.

- AND -

GOOGLE LLC,

Plaintiff,

vs.

Case No. 3:20-CV-06754-WHA

SONOS, INC.

Defendant.

CONFIDENTIAL - ATTORNEYS' EYES ONLY

ZOOM DEPOSITION OF JAMES E. MALACKOWSKI

(Reported Remotely via Video & Web videoconference)

Miami, Florida (Deponent's location)

Monday, January 30, 2022

Miami, Florida (Deponent's location)

Volume 1

STENOGRAPHICALLY REPORTED BY:

REBECCA L. ROMANO, RPR, CSR, CCR

California CSR No. 12546

Nevada CCR No. 827

Oregon CSR No. 20-0466

Washington CCR No. 3491

JOB NO. 5686085

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1 through -- through other revenue streams? 12:02:21

2 A. It is not my opinion that that happens in

3 every case, which is exactly why I present the

4 larger background discussion of Google as a company

5 willing to sell products that is a loss for other 12:02:38

6 strategic reasons. That is why the evidence

7 regarding the Mini, for example, is relevant to my

8 conclusions.

9 Q. When did -- when did Google Mini -- let

10 me ask you: When did the Google Mini come out? 12:02:56

11 A. I believe there's reference to that in my

12 timeline. I don't recall from memory.

13 Q. How about the Nest Mini? Do you remember

14 when that came out?

15 A. Again, I don't want to speculate from 12:03:13

16 memory when any given product was introduced.

17 Q. So you -- you obviously agree that

18 companies do not always immediately turn a profit

19 on new products?

20 A. That is a true statement. 12:03:32

21 Q. In fact, it often takes companies several

22 years to see a profit on -- on products that are

23 launched?

24 A. That is a true statement, but it's a very

25 general one. There are some companies for which 12:03:48

1 that is true. I would say that product that is 12:03:50
2 sold at a gross margin loss typically will not make
3 it upon volume, that products that are sold at an
4 operating loss may, in fact, make it up through
5 volume increases. 12:04:04

6 Q. What year did Sonos first make a profit?

7 A. I don't recall from memory. I believe 12:04:22
8 there is historical information of Sonos
9 profitability within the record of this case and
10 some general reference within my report as to Sonos
11 history.

12 Q. Okay. Are you -- you're not saying that
13 Sonos made a profit in its first year of selling
14 products, correct?

15 A. I'm not giving an opinion either way, 12:04:40
16 because such as is not relevant to my
17 determination. But there is information available
18 that one could go and -- and consider that. I do
19 talk about the fact that Sonos was a pioneer, and I
20 do not suspect that they made a profit in their 12:04:56
21 first year.

22 Q. And Sonos -- they didn't make a profit
23 within their first four years, did they?

24 A. I -- I don't recall from memory. We 12:05:11
25 would have to go back to the Sonos financial

1 statements to determine that. 12:05:16

2 I'll note that that's not a particular

3 element within my consideration set for the

4 royalty, so I would just simply defer you to their

5 published financial statements. 12:05:30

6 Q. Sonos wasn't profitable in 2015, correct?

7 A. Same answer.

8 Q. And Sonos wasn't profitable in 2016 or

9 2017, correct?

10 A. Same answer. 12:05:43

11 Q. Which is what?

12 A. Which is the accounting statements would

13 demonstrate that one way or the other. I don't

14 recall from memory. It's not specifically factored

15 into my analysis. 12:05:53

16 MR. JUDAH: I'm going to introduce

17 another exhibit.

18 (Exhibit 9 was marked for identification

19 by the Court Reporter and is attached hereto.)

20 MR. JUDAH: So this is going to be 12:06:21

21 Exhibit 9.

22 So Exhibit 9 -- sorry. Let me just --

23 It is a document, an article entitled

24 "Sonos reveals pitch to investors ahead of IPO."

25 Q. (By Mr. Judah) And, sir, I'd like to 12:07:16

1 direct your attention to the fourth paragraph of 12:07:20
2 this article which states "Sonos has not turned an
3 annual profit since 2014."
4 Do you see that?
5 A. Yes. 12:07:34
6 Q. And this article was dated in 2018?
7 A. Yes.
8 Q. And you don't believe that Sonos had a --
9 a strategy to sell its product at a loss in 2015,
10 do you? 12:08:01
11 A. I don't believe that Sonos had a strategy
12 to sell its products at a loss indefinitely, but
13 Sonos' business model is fundamentally different
14 than Google's.
15 Q. You don't believe that Sonos had a 12:08:10
16 strategy to sell its product at a loss in 2016,
17 correct?
18 A. Again, you are talking about long-term,
19 no. Do I believe that Google entered 2016 or prior
20 years understanding that they would incur a loss 12:08:24
21 that year; i.e., projecting a loss? I think that
22 is quite possible.
23 Q. And you don't believe that Sonos had a
24 strategy to sell its products at a loss in 2017,
25 correct? 12:08:35

1 A. Same answer. 12:08:36

2 Q. And so you'd agree that just because a

3 company sells its products at a loss for, for

4 example, three consecutive years doesn't

5 necessarily mean that they have a -- a strategy to 12:08:46

6 sell their products at a loss either in the near or

7 long term, correct?

8 A. It wouldn't necessarily mean a conclusion

9 one way or the other, which is why you need to take

10 into account the larger scope of the business, as 12:08:59

11 I've described in my report. It's also important

12 that you consider whether you're looking at overall

13 company profit or you're looking at particular

14 components of profitability.

15 With respect to Sonos, these articles 12:09:11

16 refer to overall company profit, because it is

17 investing significant dollars into research and

18 development and has, in fact, begun to experience

19 competition with unauthorized users of their

20 technology. That's very different than Google, 12:09:25

21 which as a company is tremendously profitable but

22 has decided for certain components of its business

23 to annually incur losses, I believe in order to

24 achieve profits throughout ancillary revenue

25 streams. 12:09:41

1 And so that investigation was part of my 12:09:41
2 analysis and described within my report.

3 Q. Google has invested significant dollars 12:09:51
4 in research and development for its hardware
5 products, hasn't it?

6 A. Generally speaking, yes. But they have
7 also, as reflected in the assertions in this case,
8 leverage technology of others to be successful in
9 the market.

10 Q. Sir, do you know how long it took Amazon 12:10:09
11 to make a profit?

12 A. Well, Amazon's model is, again, different 12:10:24
13 than either Google or Sonos. It took Amazon quite
14 an extended period to make a profit as they were
15 setting up their global retail distribution base.

16 Q. And you don't believe that Amazon had a
17 strategy to offer its -- to operate its company --
18 well, withdrawn.

19 Let me ask this: Tesla took several
20 years to become profitable on sales of its 12:10:44
21 products, correct?

22 A. As a company overall, yes, for many of
23 the same reasons as Sonos. It was investing in
24 research and development and establishing a new
25 class of technology that previously didn't exist. 12:10:55

1 Q. And, sir, you're familiar with the 12:10:58
2 concept of economies of scale?
3 A. Of course.
4 Q. And that's the idea that there's a
5 proportionate savings in costs gained by an 12:11:07
6 increasing level of production?
7 A. To the extent that you are having a
8 positive marginal contribution, yes.
9 Q. And so do you know whether Google has hit
10 its sales targets for any of the accused products? 12:11:25
11 A. I don't believe I've seen that
12 information to have a comparison.
13 Q. So your -- your decision to use YouTube
14 advertising and subscription revenue instead of
15 sales revenue for the accused smartphones, 12:12:07
16 computers, and tablets for the '033 patent relies
17 on the assumption that Google sells its devices at
18 lower prices so that they can increase the time
19 users spend on YouTube, correct?
20 A. Well, I believe that the conclusion in 12:12:26
21 your question is a true one, but that's not the
22 basis for my selection or the premise of your
23 question is not accurate as to the choices.
24 The choices I had were, A, to consider
25 within the royalty base both the hardware sales and 12:12:40

1 Q. Are you -- are you opining that Google 02:32:35
2 infringes Sonos patents other than the asserted
3 patents?

4 A. No.

5 Q. Okay. So when you say "Google is 02:32:45
6 infringing Sonos' patents including the asserted
7 patents," you're only referring to the asserted
8 patents there?

9 A. Well, this is general discussion of this
10 notion of efficient infringement, and it's a 02:32:58
11 background section. So my ultimate analysis is
12 based upon calculation of royalty for just the
13 asserted claims of the asserted patents, but this
14 is the context.

15 Q. So do you believe and is it part of the 02:33:20
16 context of your report and your opinions that the
17 reasonable royalty opinions you offer that Google
18 is infringing Sonos patents other than the asserted
19 patents?

20 A. No. I am not factoring that into my 02:33:31
21 calculations.

22 (Brief interruption.)

23 (Discussion off the stenographic record.)

24 Q. (By Mr. Judah) Okay. So you're not
25 offering any opinions that Google is infringing 02:33:54

1 Sonos patents other than the asserted patents in 02:33:57
2 this case, correct?

3 A. I'm not offering any opinions regarding 02:34:06
4 infringement generally. I assume infringement of
5 the asserted patents for purposes of calculating
6 damages, but I draw no conclusions as to
7 infringement independently.

8 Q. Are you assuming that Google is 02:34:17
9 infringing Sonos patents other than the asserted
10 patents?

11 A. Not for purposes of my work here, no.

12 Q. Okay. So what's the basis for this 02:34:31
13 statement here in the -- in page 20 of your
14 opinions that "Google is infringing Sonos patents,
15 including the asserted patents, as part of a
16 calculated business strategy referred to as
17 'efficient infringement,' " and specifically the
18 part that is Google infringing Sonos patents?

19 A. I think what's creating confusion for you 02:34:43
20 is the word "including." Perhaps a better word
21 would simply to replace that with "i.e., the
22 asserted patents," if that makes it clearer for
23 you. That would be an acceptable change.

24 Q. Okay. I think that clarifies it. 02:34:58
25 And so your opinion is that Google has a

1 calculated business strategy to infringe Sonos' 02:35:03
2 patents, the asserted patents here?

3 A. But more specifically that in the
4 licensing context, there is a well-understood
5 strategy of efficient infringement and that 02:35:14
6 applying the context of this case to the -- that
7 theory, in my opinion, Google is practicing, with
8 respect to these patents, that strategy.

9 Q. So your opinion is that Google is
10 practicing a calculated business strategy known as 02:35:35
11 "efficient infringement"?

12 A. In general, yes, that there's a range of
13 strategy for licensing that stem from proactive
14 outreach for freedom to operate on the one hand to
15 efficient infringement on the other hand. And 02:35:54
16 based upon my understanding of the context of this
17 record, Google would fall in the latter category.

18 Q. You don't cite here any internal Google
19 documents that purport to show that Google has a
20 calculated business strategy to infringe Sonos' 02:36:11
21 patents, correct?

22 A. I don't believe there's a document where
23 that would be stated explicitly. I see -- I
24 believe that you see that in the context of
25 launching products without seeking a license and 02:36:26

1 inability to secure licenses prior to product 02:36:29
2 introduction or upon patent issuance.

3 Q. So then you state here: "I understand
4 that efficient infringement occurs when a company
5 deliberately chooses to infringe a patent given 02:36:51
6 that it is cheaper than to license the patent."

7 Do you see that?

8 A. Yes.

9 Q. That's your understanding?

10 A. Generally, yes. That's the business 02:37:01
11 strategy.

12 Q. And your -- your opinion is that Google
13 deliberately chooses to infringe the asserted
14 patents in this case?

15 A. That Google chooses to infringe without 02:37:11
16 seeking or executing a license, yes, that that is a
17 conscious decision.

18 Q. Okay. When did Google first, in your
19 opinion, deliberately choose to infringe the
20 '033 patent? 02:37:25

21 A. Well, ultimately they began infringing it
22 upon patent issuance. I understand that all of the
23 products that are accused were in the market prior
24 to patent issuance.

25 Q. So your -- your opinion is that Google 02:37:40

1 report that's not available to me. 02:46:36

2 Q. You state here -- let's see. If you go
3 to page 221, the second paragraph.

4 You state "Google's infringement and its
5 strategy to sell its infringing products at a loss 02:47:07
6 to develop alternative revenue streams has caused
7 significant damage to Sonos."

8 Do you see that?

9 A. Yes.

10 Q. That's your opinion? 02:47:17

11 A. Yes.

12 Q. What is that significant damage to Sonos?

13 A. Are you asking me quantitatively or
14 qualitatively?

15 Q. Either. Or both. But we'll start with 02:47:29
16 whichever one you said first.

17 A. So the fact that they are -- the fact
18 that Google sells products at a loss, which include
19 products in competition with Sonos, in my opinion,
20 has affected Sonos' success in the marketplace; 02:47:42
21 that one could theorize that there would be a lost
22 profits calculation that could and should be
23 advanced as a result.

24 As we started this deposition today, you
25 know that I am not able to do that or I have not 02:47:57

1 done it, and the reason I have not done it is I do 02:48:01
2 have sufficient evidence in hindsight to make that
3 calculation to a reasonable degree of certainty.

4 So that's another example of how Google's
5 methodology of participation in this market has 02:48:16
6 benefited them. They'll never be charged as it
7 relates to these patents with the profits that
8 Sonos has lost.

9 Q. And what is the quantitative -- or sorry.
10 So was that -- that was the quantitative damage to 02:48:35
11 Sonos that you just described?

12 A. Yes. I have not been able to quan- --
13 quantitatively determine that amount.

14 Q. And how about the qualitative damage to
15 Sonos? How -- what's your understanding or opinion 02:48:53
16 of that?

17 A. Well, it's related. The qualitative
18 damage is the lost sales and the quantitative
19 damage is the measure of those lost sales.

20 Q. And specifically you believe Sonos has 02:49:15
21 lost sales due to infringement of the asserted
22 patents here?

23 A. Yes, sir.

24 Q. And you believe that Sonos has lost sales
25 due to infringement of the '033 patent that Sonos 02:49:24

1 I, Rebecca L. Romano, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

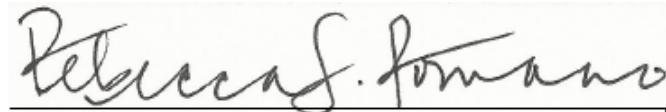
4 That the foregoing proceedings were taken
5 before me remotely at the time and place herein set
6 forth; that any deponents in the foregoing
7 proceedings, prior to testifying, were administered
8 an oath; that a record of the proceedings was made
9 by me using machine shorthand which was thereafter
10 transcribed under my direction; that the foregoing
11 transcript is true record of the testimony given.

12 Further, that if the foregoing pertains to the
13 original transcript of a deposition in a Federal
14 Case, before completion of the proceedings, review
15 of the transcript [] was [X] was not requested.

16 I further certify I am neither financially
17 interested in the action nor a relative or employee
18 of any attorney or any party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21 Dated: February 2, 2023

22
23 
24

25 Rebecca L. Romano, RPR, CCR

CSR. No 12546